IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

RP.No. 596 of 2005

AGAINST THE JUDGEMENT IN COA.2/2005 Dated 17/06/2005
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PETITIONER/APPELLANT:

INDUSIND BANK LTD.,HAVING ITS REGISTERED OFFICE AT 2401, GEN.THIMMAYYA ROAD (CANTONMENT), PUNE-411 001 AND AMONGST OTHERS ONE OF ITS OFFICES AT 711, SOLLTAIRE CORPORATE PARK, ANDHERI (E), MUMBAI.

BY ADV. SRI.MURALI PURUSHOTHAMAN

RESPONDENT/RESPONDENT IN COMPANY APPEAL:

BPL LIMITED HAVING ITS REGISTERED OFFICE AT BPL WORKS, PALAKKAD-678 007, KERALA.

BY ADV. SRI.P.K.KURIAN (SR.)

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 1.2.2007, THE COURT ON 22.2.2007 PASSED THE FOLLOWING:

K.A. ABDUL GAFOOR &
K. M. JOSEPH, JJ.

R.P. NO. 596 OF 2005
IN
COMPANY APPEAL NO. 2 OF 2005

Dated this the 22nd February, 2007

ORDER

K. M. Joseph, J.

Petitioner had filed Company Appeal No.2/05 against the order of the Company Court in Company Application No.84/04. The said Application was one filed under Section 391(1) of the Companies Act, 1956 which was ordered by the learned Company Judge. The Company Appeal was disposed of along with Company Appeals 3 & 4/05 filed by two other Institutions. According to petitioner, the Appeal of the petitioner was dismissed on the ground that the Banks and Financial Institutions which have entered into the inter Creditor Agreement (hereinafter referred to as ICA) under the Corporate Debt Restructuring Scheme, are bound by the decision of the super majority by virtue of the provisions of the CDR. It is the

case of petitioner that in its Judgment in the Appeal, this Court has proceeded on the basis that the petitioner had entered into the ICA on 5.3.2004. It is its case that although the petitioner had signed the earlier ICA, the revised ICA dated 5th March, 2004 was not signed by petitioner and petitioner was not a party to the said ICA. It is stated further that the true copy of the ICA dated 5.3.2004, Annexure A was produced by the ICICI Bank before the Company Court in M.C.A. No.84/04. It is the complaint of petitioner that the finding of this Court that the petitioner Bank is a Signatory to the ICA dated 5.3.2004, is a mistake on the face of the records, although the other two Appellants were parties thereto. It is, therefore, contended that the very basis of the Judgment dismissing the petitioner's Appeal being that the petitioner had executed Annexure A Agreement, the finding that the petitioner cannot wriggle out of the scheme of arrangement before the Company Court was erroneous and contrary to the very document relied on by the respondent. It is also stated that it is by an inadvertent mistake or misconception

that Annexure A was not referred to before this Court.

2. We heard the learned counsel appearing on behalf of the petitioner who, we note, incidentally was not the counsel who had appeared before us at the time of hearing of the Appeal which culminated in the Judgment in review.

3. An Affidavit in opposition has been filed, wherein it is, inter alia, stated as follows:

The meeting under Section 391(1) was held and elaborate arguments were heard in the Application No.CP 13/05 for orders under Sections 391 to 394. It is further stated that Annexure A was produced before the learned Company Judge by the ICICI Bank in Company Application No.25/05 in M.C.A. No.84/04 and was, therefore, part of the records in the proceedings. It is also stated to be part of Volume (1) Part 4 of the Paper Book in MCA No.84/04, and that a photo copy of this Agreement was produced during the hearing of the Appeals and the learned counsel for petitioner was all the time aware of the contents of Annexure A. It is also stated that during the hearing of the

Appeals, the learned Judges specifically enquired with the counsel for the appellants including the review petitioner as to whether all the appellants had signed the ICA and it was answered in the affirmative on which, it is stated in the Judgment, that the appellants admittedly have entered into the ICA on 5.3.2004. It is further stated that the certified copy of the Judgment must have been received on or before 27.6.2005 and inspite of that, no attempt was made to file the Review Petition as is done at present, until the matter is specifically adverted to during the submissions made before the Learned Company Judge in Company application No.13/05. Annexure R1(a) is a Notice of Intention dated 12.7.2005 wherein it is stated, inter alia, that the petitioner was not a Member of the CDR Forum at the time when the re-construction proposal was brought in, discussed and approved, and hence any decision of the CDR is not binding on it. The Company filed Ext.R1(b) Reply Affidavit. Ext.R1(d) is a Reply Affidavit of the respondent, wherein it is, inter alia, stated that the petitioner

Bank (IndusInd Bank Limited) is a Member of the CDR having signed the ICA, and that the petitioner had raised no such objection and the fact that the Bank was a Member of the CDR Scheme during the relevant time and continues to be so, has always been accepted and agreed to by the said Bank. It is the case of the respondent that the Judgment of this Court being rendered on the basis of the admission, petitioner is estopped from contending otherwise.

4. Shri P.K. Kurian, learned senior counsel appearing on behalf of the respondent would further bring to our notice certain facts. The learned Company Judge allowed the Company Petition No.13/05 by Order dated 23.8.2005. He would bring to our attention the following passages from the Judgment in C.P. No.13/05:

> *"12. This takes me to the objection raised by the Indusind Bank. According to the said objector, the proposed scheme is in violation of the provisions of law and is contrary to public policy. The first limb of this contention is that the scheme, if sanctioned, would impinge on the right*

of the objector bank to prosecute proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as "RDB Act". The second limb is that the scheme is opposed to public policy in as much as public funds are being wiped off for the purpose of sustaining a company and it amounts to unauthorised sacrifice of public funds. Thirdly, it is contended that the scheme, if sanctioned, would impair the right to continue prosecution under Chapter XVII of the Negotiable Instruments Act, 1881, hereinafter referred to as "NI Act", particularly when the bank has invoked the provisions of the said Chapter."

Thereafter, the Learned Company Judge proceeded to deal with the various objections raised on behalf of the petitioner and overruled the same. No doubt, the learned Company Judge relied on the Judgment under review. He would further submit that the petitioner is a party to the Judgment in Appeal carried against the Judgment of the Company Judge adverted to. The Division Bench affirmed the sanctioning of the Scheme, no

doubt, deleting the directions of the Company Judge whereunder, proceedings against the Company were declared as terminated. Learned senior counsel would point out that the Division Bench in fact took note of the contentions of the petitioner herein of the fact that the petitioner is not a party to the ICA. He would point out that after all these developments which this Court should undoubtedly take note of, it should not be open to the petitioner to still seek review of the Judgment.

5. Learned counsel for petitioner relied on the following decisions of the Supreme Court:

1) The Oriental Insurance Co. Ltd. and Another v. Gokulprasad Maniklal Agarwal and another (AIR 1999 SC 3407).

2) Moran Mar Baselios Catholicos and Another v. Rev. Mar Poulose Athanasius and Others (AIR 1954 SC 526).

3) Gangadhar Das and another v. Gadadhar Das and Others (AIR 1986 Orissa 173).

In The Oriental Insurance Co. Ltd. and another v. Gokulprasad

Maniklal Agarwal and another (AIR 1999 SC 3407), the counsel appearing for the employer conceded before the High Court that punishment was a minor penalty. On the said basis, the High Court took the view that it could not come in the way of promotion. The Court found that obviously the counsel appearing for the Company had committed a mistake while describing it as a minor penalty and it was held as follows:

> *"When this mistake was pointed out to the High Court, it should have really reviewed its earlier order."*

In Pridhanmal v. Laloo and Others (AIR 1931 Sind 3), the Court held as follows:

> *"The evidence on a certain point had been shut out owing to a misconception on the part of the pleader and therefore an issue on that point was found against the party.....This was a matter of considerable importance and though the ground of the application for review was not the discovery of new and important matter or evidence or some mistake apparent on the face of the record, yet it would come under the words*

"for any sufficient reason."

In Moran Mar Baselos Catholicos and another v. Most Rev. Mar Poulose Athanasius and others (AIR 1954 SC 526), the Court held that the words "any other sufficient reasons" in Order 47 Rule 1 CPC must mean a reason sufficient on grounds at least analogous to those specified in the Rule. In fact, therein the Court noted as follows:

> *"They could not properly decline to go into the question of fact on account of the admission of the defendants Advocate that the plaintiffs remained in the Church. Such admission at best was an admission as to canon law and the decision that the defendants had voluntarily gone out of the Church even in the absence of an ecclesiastical verdict necessarily implies that the concession made by the defendants Advocate requiring an ecclesiastical verdict as a condition precedent to voluntary separation also was obviously wrong and an erroneous concession of law made by the defendants Advocate could not be relied upon for saving the plaintiffs."*

Gangadhar Das and Another v.Gadadhar Das and Others (AIR 1986 ORISSA 173) was a case where the Court followed the decision in Moran Mar Baselios Catholicos and Another v. Most Rev. Mar Poulose Athanasius and Others (AIR 1954 SC 526) and held as follows:

> *"When a judgment is founded on a misconception as to a concession made by an advocate, the proper procedure is to apply by way of review to the very Court in whose judgment the error is alleged to have crept in for a rectification of the mistake, if any, and it would not be proper for the appellate Court to wipe out the effect of the so-called concession on considering the evidence."*

6. Per contra, learned senior counsel appearing for the respondent relied on the decisions in State of T. N. rep. by Secretary, Housing Deptt., Madras v. K. Sabanayagam and Another ((1998) 1 SCC 318), P.K. Vasudeva And Others v. Zenobia Bhanot ((1999) 7 SCC 377) and S.P.M. Muthiah Chetti and Others v. Muthu K.R.A.R. Karuppan Chettiar and Others

(AIR 1927 Madras 852). He would contend that admission on a point of fact as was made by counsel for petitioner during the course of the hearing, is binding unlike an admission on a point of law, and even if the document speaks otherwise, the reliance placed by the Court to entering findings on the basis of the stand taken by the counsel for petitioner, cannot be impugned in the Review Petition.

7. In State of T. N. rep. By Secretary, Housing Deptt., Madras v. K. Sabanayagam and Another ((1998) 1 SCC 318), the case pertained to a Civil Appeal from the Judgment of the Madras High Court. The Housing Board had taken a stand on the power of exemption of the State Government under Section 36 of the Payment of Bonus Act, 1965 and it had consistently taken the stand that it would require exemption from the provisions of Section 36. The Court took the view that the Housing Board had waived its contention that there was a statutory exemption under Section 32(v)(c) of the Act. The Court held that it would amount to estoppel on facts, and not on

law and would also certainly amount to a conscious giving up of its claim for statutory exemption under the provision. P.K. Vasudeva and Others v. Zenobia Bhanot ((1999) 7 SCC 377), related to a proceeding under the Rent Restriction Act. The Court found that the appellants not having chosen to challenge the order of remand, it was too late of the day to challenge the order dated 1.5.1997 passed by the High Court based on agreement of the parties. The Court further held that once the counsel for the tenants conceded before the High Court that Petitions required remand, it is not open to the tenants to contend that the order dated 1.5.1997 passed by the High Court could not have been passed. In S.P.M. Muthiah Chetti and Others v. Muthu K.R.A.R. Karuppan Chettiar and Others (AIR 1927 Madras 852), the Court held as follows:

> *"A counsel has authority to make admissions to Court on behalf of his client on matters of fact relevant to the issues in the cases in which he is engaged. Admissions on questions of law would not bind the client."*

8. We would proceed on the basis that the petitioner had not signed the ICA dated 5.3.2004, as it would appear to be the position emerging from the document produced. In fact, we delivered the Judgment in the Appeal, however, on the basis of the factual submissions made by counsel for either of the parties. Therefore, the finding that petitioner had signed ICA formed the very basis of the reasoning, and the final conclusions we reached in our Judgment rested on it. Therefore, there was no need for enquiring into the controversy now posed, at that time. While considering this Review Petition, however, we cannot also be oblivious to various facts and developments taken place later.

9. Subsequent to the Judgment delivered by us on 17.6.2005, by Order dated 23.8.2005, the learned Company Judge allowed the application filed by respondent Company under Section 394 sanctioning the Scheme of Arrangement as amended. Petitioner had raised various objections. They include the objection that the proposed Scheme is in violation of

the provisions of law and it is opposed to public policy. The Court proceeded to overrule it. No doubt, reliance was placed on the Judgment under review. Thereafter, the matter was carried in appeal and a Division Bench of this Court has on 20.12.2006 proceeded to approve the Scheme and confirm the Judgment except in so far as it related to directions given by the learned Company Judge with regard to matters pending before other Forums which directions came to be deleted. Learned counsel appearing for petitioner had in fact contended before the Division Bench that the petitioner had not signed the revised ICA and that it was not binding on the Bank, among various contentions taken. The Court found that on facts except the petitioner, others had supported the Scheme. It is to be noted that the Review Petition was filed on 27.7.2005. We note from the endorsements that the Joint Registrar directed posting of the matter before the Bench. However, it was brought up before us for the first time only on 23.8.2006. Thereafter, the matter was adjourned on request. It came up on 20.12.2006 and further on

2.1.2007. It finally came up on 1.2.2007. In fact, it is contended by learned senior counsel for respondent that petitioner ought to have moved the Review Petition before the matter was heard by the learned Company Judge and, at any rate, brought up the matter before the later Appeal was finally disposed of by Judgment dated 20.12.2006. We cannot shut our eyes to these developments. It is to be noted that in fact the admission of a fact is binding on a party. This cannot be characterised as a case where we had any mis-apprehension about the case as projected by counsel for petitioner, in the Appeal before us. Counsel who appeared for petitioner during the hearing of the Appeal had made his submissions before us on the basis that the petitioner had entered into the ICA. We would, therefore, think that, to permit the Review Petitioner to reopen a matter at this stage may in fact be productive of substantial miscarriage of justice.

10. Not only the Court pronounced Judgment in that Appeal based on that stand, but several other developments took

place affecting the interest of the parties to the Appeal and even others, based on that Judgment. It led to further litigations, which were also allowed to be concluded. This Review Petition if allowed, will result in review of several other proceedings and decisions taken in the meetings.

The Review Petition is dismissed.

K.A. ABDUL GAFOOR, JUDGE

kbk. **K. M. JOSEPH, JUDGE**